



Githunguri Dairy Farmers Co-operative Society v Waweru & 22 others (Civil Appeal E845 of 2022) [2024] KEHC 3608 (KLR) (Civ) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E845 OF 2022
DAS MAJANJA, J
MARCH 12, 2024**

BETWEEN

GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETY APPELLANT

AND

PETER NG'ANG'A WAWERU & 22 OTHERS & 22 OTHERS & 22 OTHERS & 22 OTHERS & 22 OTHERS & 22 OTHERS & 22 OTHERS RESPONDENT

(Being an appeal against the judgment of the Co-operative Tribunal at Nairobi dated 13th October 2022 in Tribunal Case No. 271 of 2010)

JUDGMENT

Introduction

1. The record of appeal in this matter is rather bulky but the singular issue for determination is whether the Appellant afforded the Respondents a fair hearing when the Appellant suspended and expelled the Respondents.
2. By a Statement of Claim dated 26.07.2010 as amended on 07.08.2011, the Respondents, who at the material time were members of the Appellant (“the Society”) filed suit against the Society at the Co-operatives Tribunal (“the Tribunal”). They sought a declaration that the individual decisions dated 24.06.2010, 08.07.2010 and 28.01.2011 directed at each of the Respondents suspending them from the Society with immediate effect pending their expulsion by the General meeting were illegal, wrongful, null and void. They sought an injunction restraining the Society from interfering or further interfering with their membership in the Society and an order directing it to restore their membership of the Society, general damages for wrongful suspension from the Society and unfair treatment and special damages as tabulated in the statement of claim.



3. In its defence, the Society filed a defence and counterclaim dated 24.08.2010 that was amended on 26.09.2011. It contended that the Respondents had no cause of action against it as they were suspended after they waived their right to give oral evidence in opposition to the charge and relied entirely on a purported written defence called demur.
4. In its judgment dated 13.10.2022, the Co-operative Tribunal (“the Tribunal”) considered whether due process was followed in the suspension and expulsion of the Respondents. It held that the Respondents were not given an opportunity to respond to the allegations against them in line with section 4 of the *Fair Administration Action Act*, 2015 and Article 47 of the *Constitution*. The Tribunal found that the Society did not explain reasons it suspended and later expelled the Respondents. That the Respondents were present, presented a letter and or demurer to them and by opting to suspend them because it they were unco-operative not a sufficient reason to suspend and expel members. That the Respondents were in fact not given an opportunity to defend themselves as they were removed from the premises by the police citing “disorderliness”.
5. The Tribunal held that it would have been prudent for the Society to give another opportunity for the Respondents to respond to the Notice to Show Cause. As a result, the Tribunal found in favour of the Respondents and entered judgment for them against the Society as follows:
 - a. The suspension and expulsion of Claimants was illegal, wrongful, null and void
 - b. A permanent injunction be issued restraining the Respondent Society from interfering or further interfering with the Claimant’s membership in the Respondent Society and their attendant rights and privileges thereof=
 - c. The Respondent to restore the Claimants membership together with this rights and privileges
 - d. General damages @ 150,000 per Claimant
 - e. Specia damages as tabulated per Claimant-Average No. of litres x 30 days x 12 months x 10 years x price @25
 - f. Costs and interest in the suit to the Claimant
6. This decision by the Tribunal is now the subject of the present appeal that has been filed by the Society through its Memorandum of Appeal dated 21.10.2022.

Analysis and Determination

7. In resolving this appeal, I am cognizant that the court derives its appellate jurisdiction from section 81 of the *Co-operative Societies Act* which empowers the High Court to, to inter alia, exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought or make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.
8. Even though the Society raises 32 grounds in its memorandum of appeal, it is principally urging the court to re-evaluate the evidence and submissions on record and make a determination whether and then determine whether the conclusions reached by the Tribunal are to stand or are to be disturbed. Further, even though the parties presented copious arguments in evidence and submissions, the issue before the Tribunal was narrow and was mainly whether the Respondents were accorded due process in their suspension and expulsion from the Society.



9. The doctrines of fairness and due process are firmly etched into our constitutional fabric. Every body or person adjudicating over the rights of any person is required to observe these doctrines. Article 47 of the Constitution enshrines the right of every person to fair administrative action. The manner of actualization of those rights have been enacted in the Fair Administrative Action Act, 2015. The right to fair administrative action under Article 47 and the right to fair hearing under Article 50 of the Constitution all accrue to persons such as the Respondents before a decision to remove them from the membership of the Society is reached. The Supreme Court, in Sonko v County Assembly of Nairobi City & 11 others [2022] KESC 76 (KLR) (5 December 2022) (Reasons) explained the position of due process as follows:

114. To the question whether due process was followed in the removal of the appellant, the audi alteram partem rule requires that those who are likely to be directly affected by the outcome of a decision should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. They must be given an opportunity to be heard, to call witnesses, to be represented by counsel, to be availed adequate time and facilities to prepare, and if the accusations are proved, to be given the reasons for the decision. Of course, beyond here, they are also entitled to challenge the decision, if against them, before a higher tribunal or court.

10. It is common ground that on various dates between 08.06.2010 and 17.06.2010 the Respondents were invited to appear before the Society's board. The body of one of the invitation letters reads as follows:

During our Special General Meeting held on 29th May, 2010, you maliciously destroyed society property valued at Kshs 120,960.00(One hundred twenty thousand nine hundred sixty shillings only).

This is a criminal offence besides being a violation of the society's by-law which you subscribed to upon admission to the society,

You are hereby invited to appear before the management committee on 15th June 2010, 10.00a.m at the society's boardroom, to show cause why you should not pay for the damage besides being expelled from the society.

Please be punctual.

11. In response to these invitations, the Respondents stated as follows in their letter of 14.06.2010:

We the undersigned being the persons severally invited vide the letters evenly dated 8th June 2010 to appear before the management committee (sic) wishes to make the following humble representation respecting the purported NTSC.

1. it's apparent that the Board/management committee has already adjudged us guilty of having maliciously damaged society's property without affording us the benefit of being presumed innocent until proven otherwise. :

2. it's our humble understanding that the society's by-laws and generally the law of the land that at this stage the Board/management committee can only present allegations against us.



3. Natural justice requires that we be furnished with information supporting the purported allegations against us to enable us effectively defend ourselves and show cause why we should not be called upon to pay for the already adjudged malicious damage apart from being expelled from the society.
4. In light of the foregoing we are jointly and severally contending that the proceedings scheduled for 15th June 2010 contravene the letter and spirit of the by-laws and the law of the land generally. Accordingly, we are objecting to these proceedings in their entirety.

12. In the Society's letter of 24.06.2010 it stated as follows:

Reference is made to our letter dated 8th June 2010 inviting you to appear before the management committee to show cause why you should not be charged for the damages incurred during the Special General Meeting held on 29th May 2010 besides being expelled from the society in accordance with the Society's by — laws and your subsequent appearance on 15th June 2010.

it has been noted with concern that you maliciously destroyed Society property. In so doing your actions were in violation of the society by — laws.

In view of the above, the management committee regrets to inform you that you have been suspended from the society with immediate effect pending your expulsion by the General meeting

13. From the aforementioned letters of the Society, I would agree with the Respondents that in as much as the subject of the letter was an invitation to show cause, the body of the letter clearly indicated that the Society had already made up its mind that the Respondents were guilty of the destruction of property and that the invitation was nothing more but a ceremony or formality of their suspension and eventual expulsion. The Society basically read out a 'judgment' to the Respondents before setting out an allegation in the form of a charge that would have enabled the Respondents prepare a defence for themselves. The Society decided to act as prosecutor and judge before the case against the Respondents could begin and one could figure out the Respondents' apprehension in their response to the invitation that no justice was going to be served to them.
14. Whereas the Society has the power to sanction any of its members who violates its by-laws, the said members are entitled to due process as afforded and I find that the manner in which the Society went about to 'discipline' the Respondents was against the basic tenets of a fair hearing and the Tribunal was right to come to this conclusion. I disagree with the Society that the Respondents' response above was a waiver of their right to defend themselves or present oral evidence before the Society. The Respondents had every right to demand that the hearing they were to be accorded was fair and not illusory and they were not wrong to state that the Society had already condemned them unheard. This demand to be accorded a fair hearing was not a waiver of their right to be informed of the charge or case they will be called upon to meet, their right to be given an opportunity to be heard, to call witnesses, to be represented by counsel and to be availed adequate time and facilities to prepare.
15. The Society's position that one of the Respondents waived his right by acting in a violent manner during the said disciplinary proceedings was not substantiated and there is no 'documentary evidence' on record to this effect as stated by the Society. If anything, I note that the court in Kiambu CMCC 1332 of 2010 in a judgment dated 11.09.2012 found that it was unable to conclude with certainty that



some of the Respondents who were charged in court were responsible for the mayhem that erupted during the Society's meeting of 29.05.2010.

16. I find that the Society concentrated much on its by-laws and the fact that political activity is frowned upon in its activities rather than on its members' rights to a fair hearing and a fair administrative action and how their processes for actualizing the same was flawed. I therefore find and hold that the Society did not accord the Respondents due process.
17. On the general damages awarded, I note that the Tribunal was rightly guided by the decision of Lord Nicholls in *Siewchand Ramanoop v The AG of T&T*, PC Appeal No 13 of 2004 cited with approval by the Court of Appeal in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others* (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment) where it was held that an award of general damages for constitutional violations is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss. Thus, guided by the above, the Tribunal adopted the proposal of Kshs 150,000.00 by CW1 and CW2 who testified on behalf of the Respondents. The Tribunal was therefore not wrong in awarding the same as the two witnesses' testimony bound the other Respondents and the Society cannot state that the award of Kshs 150,000.00 was only for the two witnesses.
18. On the special damages, it is indeed true that they are awarded for losses that are not presumed but have been specifically proved and that can be quantified, such as out-of-pocket expenses or earnings lost during the period between the injury and the hearing of the action (See *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others*(*supra*)). In its defence, I note that the Society did not dispute the numbers of what the Respondents had tabulated as the damages they had incurred. The point of divergence is the period of suspension since which the Society had stated was between February and 31st March whereas that of the Respondents was for the entire period they were suspended which was just over 10 years as at the date of the judgment. The Tribunal was thus not wrong to award the said sums as tabulated and apply the multiplier of 10 years as this was the period within which the Respondents had been wrongfully suspended and expelled out on their milk sales from the Society. These grounds of opposition by the Society therefore fail.

Disposition

19. For the reasons outlined above, it is my view that this appeal lacks merit. It is dismissed with costs assessed at Kshs 150,000.00.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH 2024.

D. S. MAJANJA

JUDGE

